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Subject: RE: Carolina Journal: Experts debate legality of Cooper's pipeline deal

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To: Maddrey, John F <John.Maddrey@doa.nc.gov>; Magarira, Munashe <Munashe.Magarira@nc.gov>; McLeod, Gregory S <Greg.McLeod@nc.gov>
Subject: Fwd: Carolina Journal: Experts debate legality of Cooper's pipeline deal

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Sent: Tuesday, January 30, 2018 10:24:39 AM
Subject: Carolina Journal: Experts debate legality of Cooper's pipeline deal

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[Carolina Journal: Experts debate legality of Cooper's pipeline deal]
January 30, 2018
By Dan Way

RALEIGH — Is a financial agreement between the governor of North Carolina and a private party legal just because the governor says so?

That's the gist of the memorandum of understanding hammered out between Gov. Roy Cooper's administration and the four utilities building the Atlantic Coast Pipeline. Under the deal, announced Friday, the pipeline operators would pay $57.8 million for projects the governor wants, and, in exchange, the operators get to build the multibillion-dollar pipeline across eastern North Carolina.

Former N.C. House Majority Leader Paul "Skip" Stam, a Wake County attorney in private practice, says the deal violates the state constitution and would take away the rights of North Carolinians to challenge terms of the agreement in court. In contrast, Gerry Cohen, the General Assembly's former special counsel, said the agreement seems unusual because it didn't go through normal budget channels. But Cohen thinks it could survive a possible legal challenge.

Meantime, legislative leaders are seeking guidance on the legality of the arrangement.

"The Speaker's office is reviewing details of the agreement with the General Assembly's Fiscal Research Division and the Office of State Budget and Management," Joseph Kyzer, spokesman for House Speaker Tim Moore, R-Cleveland, told Carolina Journal. "We learned of the fund on Friday afternoon when it was announced to the public and will comment after we receive additional information from those agencies."

Shelly Carver, a spokeswoman for Senate leader Phil Berger, R-Rockingham, said Berger's office was looking into the issue.

"It's beyond me what [Cooper's] legal authority could be for this," Stam told CJ. "I know of no authority for this whatsoever."

The state Department of Environmental Quality evaluates projects and decides whether an applicant has met the requirements to obtain a permit, Stam said. The pipeline developers met their burden.

In addition, Stam said the governor told pipeline developers, in essence: "I'll give you a permit to which you're otherwise entitled if you'll give $58 million to some of my favorite objects of beneficence" — repairing environmental harms, supporting economic development projects, and building renewable energy facilities.

He said Cooper is trying to enact what's known legally as an exaction. "It's what the government tries to get private people to pay in exchange for letting them do things with property."

The agreement states the funding arrangement is not a settlement based on penalties, fines, or forfeitures. (Here is the state law covering distribution of settlements.)

Stam thinks the governor is playing word games.

Just because the governor said it's not a settlement "doesn't mean he has the authority to do this, and that it's not a settlement," Stam said. The developers aren't paying for taking land to build the pipeline, in which case money would go to landowners, Stam said. Rather, the governor is saying the developers are paying into the fund because the pipeline would impact the land during construction and limit its use when the pipeline is operating.

Stam is representing the conservative Civitas Institute in a legal challenge of a 1999 settlement reached by former Attorney General Mike Easley and Smithfield Foods. In that deal, Smithfield agreed to pay $15 million to N.C. State University for cleaner hog-waste disposal technology and $2 million a year for 25 years to the attorney general's office for discretionary spending.

The lawsuit claims the settlement was in fact a fine. The state constitution requires fines to be spent on public schools. Civitas lost in Superior Court, but the ruling is now before the state Court of Appeals.

Joe Coletti, a senior fellow at the John Locke Foundation and former fiscal analyst for the state budget office, called the financial arrangement "extortion."

"The payment was made under threat to move the project forward," Coletti said. "The structure of the deal seems designed to skirt the constitutional requirement for the General Assembly to approve the raising and spending of funds. An escrow account approved by the governor with expenditures tied to the governor's wishes is surely not in keeping with the spirit of the law or the constitution."

For his part, Cohen, also in private practice, says the agreement may look fishy because it didn't go through regular budget channels. But he doesn't see a constitutional problem with it.

"It wouldn't be the first time a third-party agency administer[ed] private funds," Cohen said.

"It doesn't jump out to me that there's any constitutional issue if a third party says that it's going to let the governor designate where certain monies are to go," although he has not read all the documents to make a definitive conclusion, Cohen said.

Cohen said the deal Cooper worked out sounds similar to the structure of Golden LEAF, an independent, nonprofit third party that gives grant money to economic development projects.

One distinction might be that legislative leaders pick some of the members of Golden LEAF's board of directors, with the governor appointing the rest.

Another difference is that Golden LEAF's funding comes from a master settlement with cigarette makers. The memorandum of understanding between the governor's office and the Atlantic Coast Pipeline operators states it is not a settlement and does not involve penalties, forfeitures, or fines.

Cohen said he's not sure that makes a difference.